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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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Two years ago this Court explicitly recognized that the must-carry law has direct and immediate effects on speech. *See Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994). Insofar as the law requires cable operators to devote scarce capacity to local broadcast stations, it prevents operators from offering different speech to subscribers on those channels; forecloses other programmers (those that would otherwise have been carried) from reaching those subscribers; and, as a consequence, denies subscribers programming that, absent the law, they would have received. *Id.* The law thus puts the Government smack in the middle of the private marketplace, dictating that certain programmers (local broadcast stations) be given preferred access to viewers.

What is the justification for this interference? In 1992, knowing that the law would be challenged, Congress put forward a two-part rationale for the law that, on its face, looked imposing: that, left to make voluntary decisions, cable operators would be driven to deny carriage in order to injure broadcast stations as competitors for advertising revenues and that, as a result, the "economic viability" of local broadcasting would be "seriously jeopardized." *See Findings* ¶¶ 14-16 (J.S. App. 116a-17a). In its initial defense of the law, "the Government relie[d] in principal part" (114 S. Ct. at 2470 (plurality opinion)) on that specific finding and, in keeping with that defense, this Court declared that the first critical factual inquiry on remand was to be "whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry" (*id.*). But all this proved to be much ado about nothing: not only does the Government now concede that the economic health of local broadcasting is not in any jeopardy, it no longer even mentions the discredited prediction by Congress that it would be.

With this principal justification out of the way, however, there is nothing left to support the law. Although the Government tries to resuscitate part of the prediction made by Congress—*i.e.*, that adverse decisions about carriage will be made in order to divert broadcasters' advertising revenues—this piece of the theory fails for the same reason that the larger theory (a resulting loss of "economic viability") failed: the record shows unmistakably that cable operators voluntarily carry the vast majority of broadcast stations, including the most popular stations that command virtually all of the advertising revenues. The same fact also demonstrates that vertically integrated cable operators do not drop attractive broadcast programming in order to increase audiences for their own programmers—the only argument the Government can make linking the must-carry requirement with

vertical integration (now that it recognizes the separate provisions in the Act dealing directly with vertically integrated operators and programmers). It is thus impossible to conclude that, as a general rule, decisions about carriage are primarily driven by an intention to injure broadcast competitors. That is the end of the matter as far as this interest is concerned: applying the traditional requirement that a law must be tailored to any genuine interest, the present must-carry law, which prohibits *any* decision not to carry a broadcast station, cannot stand on a theory that *some* decisions might rest on unlawful motives. *See, e.g., Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

The remaining interest now asserted is simply a blanket interest in assisting each individual broadcast station. But this interest is difficult to square with any intelligible concept of local broadcast*ing*: the number of local stations varies from community to community, and the Government has yet to explain why it is essential that cable operators in some communities be forced to carry more broadcast stations than are even available in most communities. Indeed, given that the stations not carried tend to be little-watched stations in areas with an unusually high number of stations, it seems evident that viewers in those areas (whether cable subscribers or not) are already exposed to more broadcast programming than the typical viewer. In any event, if the Government believes that it is important to support individual broadcast*ers*, it has other means at hand (most obviously, direct financial assistance) that would assure the financial integrity of all stations *without* suppressing the First Amendment rights of cable operators and programmers. If the interest in aiding individual stations does not justify the lesser intrusions of the former, it certainly does not warrant the greater intrusions of the latter.

ARGUMENT

Before turning in more detail to the interests now said to support the must-carry law, we note several preliminary points about the approach taken in the Government's brief. To begin with, by bifurcating its argument into a discussion of various interests and then a separate discussion of various alternative means, the Government has made no real attempt to show that the must-carry law is properly tailored to serve a *particular* asserted interest. As we discuss, however, different claimed interests raise different tailoring problems: for example, the law plainly sweeps too broadly to fit with one asserted interest (protection against anticompetitive behavior), while it is possible to serve another claimed interest (aiding individual broadcast stations) by other means less intrusive on speech. Furthermore, as a related matter, the Government quite conspicuously ignores one of the linchpins of "tailoring" analysis: that a law may be invalid because it goes well beyond the kind of more targeted law that would protect the claimed interest without undue suppression of speech. The failure to address that issue is particularly unusual here, given that the law is a flat ban (against any decision not to carry broadcast stations) regardless of the reasons for that decision.[1]

The Government also dismisses, almost disdainfully, the notion that the must-carry law might have rested on a fear that the broadcast system as a whole would be in jeopardy. We agree that the broadcast system was not in jeopardy in 1992 when the Act was passed or at any time since then. But the fact remains that, in explaining the purported need for the must-carry law, *Congress* said

[1] The Court in *Edenfield v. Fane*, 113 S. Ct. 1792, 1802-04 (1993), for example, struck down a flat ban on in-person solicitation by accountants—despite the obvious possibility that *some* solicitations might be fraudulent—noting that to allow a sweeping ban "would . . . be inconsistent with this Court's general approach to the use of preventative rules in the First Amendment context." *Id.* at 1803.

that it was (that the "economic viability" of local broadcasting would be "seriously jeopardized," *Findings* ¶ 16), and the Government saw fit to emphasize that finding in its previous defense of the law. *See Turner*, 114 S. Ct. at 2470 (plurality opinion). Although the Government now acts as though the finding never existed, it nonetheless stands as the principal *stated* reason offered by Congress for enactment of the law.

This declaration by Congress is not simply water under the bridge: the inability of the Government to defend it—given the fact that the economic viability of local broadcasting is not in any jeopardy whatsoever—is important for two reasons. Most obviously, it removes *that* interest as a basis for upholding the law. But, in addition, it necessarily casts doubt on some of the *other* interests now advanced by the Government—interests that Congress did not itself seem to regard as justifying the broad compulsions of the must-carry law.[2] As this Court has recently observed, "[t]he justification [for laws subject to heightened scrutiny] must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 64 U.S.L.W. 4638, 4643 (June 26, 1996).[3] That principle must be controlling here as well.

[2] For example, Congress made no finding that cable operators would discriminate in favor of unaffiliated cable programmers at the expense of broadcast stations, nor did it express a concern that broadcast stations would be hampered by an inability to offer so-called "ad avails." *See* pages 8-10, *infra*. Similarly, Congress did not find that the must-carry law is needed merely to bolster the finances of individual broadcast stations, regardless of a lack of viewer interest in the community.

[3] The Court has made a similar point in the First Amendment context as well, emphasizing that "[u]nlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions. . . . Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield v. Fane*, 113 S. Ct. at 1798 (citations omitted).

1. The Government tries hard to portray the must-carry law as a defense against anticompetitive activity by cable operators. The theory comes in two primary parts: protection against non-carriage decisions driven by an incentive to siphon off advertising revenues and protection against non-carriage decisions driven by a desire to limit competition for vertically integrated programmers. Neither part comes close to justifying the law. However looked at, the must-carry law is simply not a law aimed at, or tailored to, any genuine problem of anticompetitive behavior.

a. It must always be kept in mind that the must-carry law bars cable operators from refusing to carry a station electing must-carry status *for any reason*, not just for reasons deemed anticompetitive. The Act thus, by its terms, controls decisions at the heart of the First Amendment: the choice by cable operators about what programming to provide subscribers. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706 (June 28, 1996). Quite obviously, there is nothing anticompetitive, in and of itself, about a decision to carry one programmer rather than another; cable operators routinely change the mix of programming offered in their communities, responding to the availability of different programming sources and the interests of their subscribers. Indeed, the choice of programming typically reflects nothing more than the natural workings of a marketplace for speech.[4]

To support a law altering this marketplace, the Government, in effect, seeks to employ a conclusive presumption that decisions about carriage of broadcast stations

[4] Although these decisions concededly would lead to the displacement of some broadcast stations, that fact shows only that there are winners and losers in any marketplace. Indeed, given scarce channel capacity, it is highly common for cable operators to drop *cable* programmers in altering the package of programming made available to subscribers.

are driven by a desire to injure those stations as competitors for advertising revenues. But, given that "[b]road prophylactic rules in the area of free expression are suspect" (*Edenfield*, 113 S. Ct. at 1803 (internal quotes omitted)), the Government must establish a convincing basis for that broad presumption. This it has utterly failed to do. To the contrary, for all its talk of "bottlenecks" and "incentives," even the Government must acknowledge that cable operators voluntarily carry the vast majority of broadcast stations attracting a measurable audience—and thus any significant advertising—even paying compensation to do so in many instances. *See* NCTA Br. 18-22. Indeed, that is precisely why the finding advanced by Congress (that the economic viability of local broadcasting would be seriously jeopardized) turned out to be so off-base. At every known point, it turns out, the incentive to offer subscribers programming of interest (a part of the equation resolutely ignored by the Government) has outweighed any incentive to harm broadcast stations as competitors.

The Government cannot dispute that cable operators willingly carry broadcast stations accounting for most of the available advertising revenues; it tries to argue, instead, that there is a *greater* incentive to injure those broadcast stations with *the least* revenues. *See* Gov't Br. 25. But, once it is acknowledged that cable operators carry virtually all other stations, this hypothesis becomes impossibly thin. Not only are the revenues at stake relatively small, but the likelihood of their being acquired by the cable operator—rather than, for example, by the numerous popular broadcast stations already being carried voluntarily—is smaller still.[5] Furthermore, of course, cable operators would face the threat of treble damages

[5] The staff of the Federal Trade Commission pointed out the illogical nature of any such strategy in concluding that carriage decisions were not guided by an intent to injure broadcast stations as competitors for advertising revenues. J.A. 179-81.

(and, perhaps, punitive damages) for any genuinely anti-competitive behavior. The theory advanced by the Government thus stands essentially unsupported. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1510 n.18 (1996) (plurality opinion) (rejecting state arguments based on "speculative assertions").

The Government also complains that cable operators might favor cable programmers because they, unlike broadcast stations, can offer so-called "ad avails." But there are at least two serious problems with this hypothesis. First, to repeat the critical point once again, cable operators carry most broadcast stations *even though* they cannot offer ad avails. That fact makes clear that cable operators do not discriminate against broadcast stations *as a class*. Second, and equally important, broadcast stations *could* provide ad avails, like other programmers, except for the fact that Congress has required transmission of broadcast signals without alteration. *See* 47 U.S.C. § 534(b)(3); *see also* 17 U.S.C. § 111(c)(3). Indeed, the Government seemingly concedes that the claimed problem is one of Congress' own making (and thus within its power to solve), but it nevertheless objects to any legislative change to put broadcasters on even footing, saying that to allow the granting of ad avails would ultimately reduce broadcasters' revenues. Gov't Br. 24-25 n.13. This objection basically reduces its argument about ad avails to the unappealing assertion—the same one underlying the asserted interest in aiding individual stations for their own sake—that it is better to suppress the rights of cable operators and programmers than to impose any financial costs on the broadcasters or, for that matter, on the Government itself.

b. The Government faces similar problems with respect to its vertical integration theory: that is, that cable operators will drop broadcast stations to advance their own programming services. Again the lack of fit between law and interest is apparent right from the start.

The must-carry law applies to any decision about carriage of a qualifying broadcast station by any cable operator, regardless of whether that decision is made by a vertically integrated operator or favors a vertically integrated programmer. Thus, a cable operator cannot decide to carry a cable programmer in which it has no financial interest rather than a little-watched broadcast station, even though there is no vertical relationship involved at all. The law thus is far broader than any legitimate concern about vertical integration could possibly justify.

The Government makes a partial response to the mismatch between law and interest, arguing that there is no "underinclusiveness" analysis under the First Amendment (and, thus, apparently no need to worry that Congress, in the must-carry law, discriminated in favor of broadcast stations and against unaffiliated cable programmers). Gov't Br. 16-17 n.4. But this argument misses an important point. Whether or not "underinclusiveness" is a *separate* ground for invalidation of a law, the Court has recognized that an underinclusive law casts considerable doubt on the interest claimed to justify it. In *United States v. Nat'l Treasury Employees Union*, 115 S. Ct. 1003 (1995), for example, the Court questioned the need for a law preventing federal employees from writing articles in light of the fact that the law allowed the employees to write a series of articles. Likewise, in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the Court noted that, while a federal law barred disclosure of alcohol content on beer labels, it mandated disclosure for wines and spirits. Here, by the same token, it seems unlikely that Congress meant to rest the must-carry law on serious concerns about vertical integration, in light of the fact that, by granting favored status to broadcast stations, the law actually makes it harder for other unaffiliated programmers to gain access to cable subscribers.

The idea that concerns about vertical integration are behind the must-carry law becomes even more improbable

when it is recalled that different provisions of the 1992 Cable Act deal directly with (and impose limits on) the carriage of vertically integrated programmers. *See* 47 U.S.C. §§ 533(f)(1)(13), 536, 548(b) and (c). The Government acknowledges those provisions, but it insists that the must-carry law nevertheless serves an ancillary purpose: to prevent cable operators from dropping attractive broadcast programming that would compete with vertically integrated programming. Gov't Br. 20-21. Problems with fit aside, that theory runs aground on the same omnipresent fact: that cable systems carry virtually all *popular* broadcast programming. It is nonsensical to think that cable operators, to help their own programming services, choose to carry the most popular competitive broadcast programming and to drop the least popular. Once again, therefore, the Government has put forth a speculative theory that is incompatible with any rational view of the record.

The difficulties faced by the Government in justifying the must-carry law are perhaps best captured in its efforts to characterize the law as a measure assuring broadcast stations "the opportunity to compete fairly" for viewers of cable television. *See* Gov't Br. 47. Even by Washington standards, this description is a strange use of language. What the must-carry law in fact does—and what it specifically intends to do—is to assure that broadcast stations *win* the competition for scarce access to local cable viewers. Viewed from the standpoint of a cable programmer, this mandated outcome is all the more oppressive, of course, because the Government has already given broadcast stations free guaranteed access to any local household utilizing an over-the-air antenna. In effect, therefore, the law builds upon an earlier inequality, providing broadcast stations with access to all cable and over-the-air viewers in an area, while leaving an excluded cable programmer (one that would otherwise be carried by the operator) with access to none. The law, far from

protecting competition in the marketplace for speech, simply tilts the outcome to the Government's liking.[6]

2. Although the Government salts its defense of the law with theories about anticompetitive behavior, it is finally willing to rest the law on a plain, unvarnished ground: that the law assures carriage for broadcast stations that would otherwise be dropped, even if the reason is solely to provide programming of greater interest to subscribers. Setting forth the interest this way admittedly takes care of one problem: if the purpose of the law is simply to advance the interests of broadcast stations, a law that does just that cannot easily be declared too broad. This happy "fit," of course, is anything but accidental. All the Government has done is to restate the effect of the law as its purpose—a practice explicitly disapproved by this Court. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991).

The problem with this sort of defense, as this Court has recognized, is that it is essentially "circular." *Id.* It does little to illuminate the need for the must-carry law to say that it gives guaranteed access to every broadcast station because it is important to give guaranteed access to every broadcast station. The question remains: *why* is it important? Yet, apart from the usual mutterings about "diversity" (here, meaning nothing more than a greater diversity of *broadcast stations*—another circular point), the Government offers little by way of explanation.

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[6] Although the Government continues to argue that excluded cable programmers may still be received in other locations, this kind of argument has long been rejected by this Court. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147 (1939). It would be surprising, for example, to find that a State could defend a ban on the advertising of a particular product on the ground that sellers were free to advertise in other States. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

It is possible, however, to rule out several conceivable reasons. The must-carry law is not necessary, for example, to make sure that each local community continues to be served by a significant core of local broadcasting. Quite apart from the fact that *voluntary* carriage would achieve that end, that kind of underlying justification would support only a narrower must-carry law requiring carriage of a *minimum* number of stations, not a law compelling carriage of *all* stations seeking access. Similarly, the must-carry law is not necessary to assure carriage of broadcast stations that attract a significant audience within a local community: that goal again could be achieved by a narrower law incorporating (as past must-carry rules once did) a minimum viewership standard.[7]

The law thus comes down to an interest in requiring carriage of a broadcast station solely on the ground that it is a broadcast station. But, as the D.C. Circuit pointed out more than a decade ago, there is no coherent rationale to a law requiring carriage of 12 stations in some communities and 5 stations in other communities. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). It cannot be *necessary* to some governmental end that viewers in every community have access to 12 broadcast stations because most viewers would have access to far fewer stations anyway. And this would be so whether cable television existed or not.

This is not to say that there is anything inherently wrong with the federal government seeking to aid broadcast stations. But the fact that the interest stops there informs First Amendment analysis in several ways. As an initial matter, it makes quite clear that the must-carry law is nothing more than what it seems to be: not a law

[7] We do not, therefore, rule out the possibility that a must-carry law tailored to a more concrete, substantial interest might be compatible with the First Amendment.

protecting local broadcast*ing* but a law protecting local broadcast*ers*. That aim—pursued at the expense of other speakers, and without any need to show anticompetitive behavior or other misconduct—places the measure squarely at odds with the fundamental principle that it is generally not the business of government to decide what speech is (and is not) to be heard. *See Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991). It is difficult to see why that principle should give way when the Government is serving no interest other than protecting the financial wherewithal of those programmers that it prefers.

Viewing the interest as aiding broadcast*ers* for their own sake also brings into play the availability of other means. The reason is simple: it removes the idea that the must-carry law is targeted at pervasive misconduct by local cable operators. Thus, if the Government were able to establish that decisions about carriage are typically driven by anticompetitive motives, it would be difficult to argue that Congress must address that problem by making direct subsidies to those injured by the unlawful behavior. In those circumstances, it would fit with traditional notions of antitrust remedies to make the wrongdoers responsible for their misconduct, giving the victims access to the foreclosed opportunity. The choice of means looks quite different, however, if the Government is merely seeking to assure the financial health of broadcast stations dropped for wholly benign reasons—most particularly, a desire to provide programming of greater value to subscribers—that are commonly within the range of choices protected by the First Amendment. There, it is entirely reasonable to expect the Government, not to override private decisions, but to support its favored programming with its own funds, as it commonly does to encourage other forms of favored speech.[8]

[8] Thus, for example, the Government may have an interest in promoting unrecognized artists or playwrights. It is difficult to imagine, however, that the First Amendment would tolerate a law

It seems beyond serious question that a program of federal subsidies, rather than forced carriage, would promote the financial interests of local broadcasters with far less suppression of speech.[9] That form of support would not compel anyone to displace speech that it would prefer to carry in favor of speech selected by the Government. And it would not have the effect of shutting off cable programmers (those that would be carried by the voluntary decisions of cable operators) from their potential audience in various communities. It would seem, in fact, the paradigm of a less restrictive alternative.[10]

The Government, indeed, appears to accept that the use of subsidies would be less restrictive; its argument is only that they would be less effective. The problem, says the Government, is that a program of subsidies might assist *too many* broadcast stations, propping up undeserving as well as deserving stations. Gov't Br. 47. But this concern

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compelling private galleries or theaters to show their works. *See Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 24 (1986) (Marshall, J., concurring in judgment); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[9] We assume, for purposes of this discussion, that the inability of some broadcast stations to obtain carriage would affect them adversely. At the same time, it should be noted that broadcast stations, even without subsidies, may continue to operate profitably. And, of course, stations may elect to alter their programming to make it of more interest to the community and thus more likely to be allocated scarce capacity on local cable systems.

[10] Subsidies seem all the more appropriate to the extent that the Government is seeking to *expand* the broadcast system rather than merely protect it from the advent of cable television. *See* Gov't Br. 32 (arguing that carriage promoted "the expansion in the number of broadcast television stations by increasing the potential audiences of UHF stations" (internal quotes omitted)). Whatever may be the legitimate role of government in sheltering an older technology from competition from a newer one, it hardly seems appropriate for government to dictate that the latter must be held responsible for making the former *better off* than it would otherwise have been.

is pure invention. First of all, it is patently inconsistent for the Government to worry that some stations seeking subsidies might *not* be deserving, but at the same time insist that each and every station seeking carriage *is* deserving. That speculation only serves to point up the irrationality of a blanket all-inclusive must-carry rule. Moreover, its entire point about subsidizing undeserving stations depends on a single supposition: that it could not make reasonable distinctions among applicants for subsidies. But, even aside from the fact that it commonly makes distinctions among applicants for other kinds of subsidies, the Government historically has made even more critical distinctions in the context of broadcast stations—deciding which applicants receive (and retain) broadcast licenses based on an evaluation of their fitness to operate a station. Against this background, the purported inability of the Government to establish a sound basis for awarding monetary subsidies, if any indeed are needed at all, seems more feigned than real.

We acknowledge that the Government may prefer to promote favored speakers by means that do not involve any expense to its treasury. But, as we said in our opening brief, *see* NCTA Br. 43-44, it says much about the importance, or lack of importance, of a claimed government interest that the Government is unwilling to commit its own funds in support of it. Whatever the Government may say about the benefits of assuring that each broadcast station is financially secure, it appears, in the end, that it regards this as a goal worth achieving only by suppressing the rights of others, not by making an outlay of government funds. Protection of the government fisc is a legitimate end in itself; but it cannot stand as a proper basis for imposing serious, and unnecessary, restrictions on speech.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted,

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